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Azimah bt Hamzah v Ketua Pengarah Jabatan Pendaftaran Negara & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01 (A)-233–03 OF 2020

KAMALUDIN MD SAID, VAZEER ALAM AND GUNALAN MUNIANDY JJCA

25 JANUARY 2023

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Administrative Law — Judicial review — Application for — Judicial review of respondent's decision in rejecting appellant's citizenship application under art 14(1)(b) of Federal Constitution read with s 1(e) Part II, Second Schedule of Federal Constitution — Appeal against High Court's decision in dismissing judicial review application — Whether appellant had satisfied requirements of s 1(e) of Part II, Second Schedule of Federal Constitution

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This was an appeal against the decision of the High Court in dismissing the judicial review application of the appellant. The appellant was born on 3 June 1986 at the Cherating Refugee Camp, Kuantan, Pahang. Both of her parents were refugees from Cambodia, and at the time of the appellant's birth they were not Malaysian citizens. They had since been naturalised as Malaysian citizens. Since birth, the appellant had lived in Malaysia and is now a permanent resident. The appellant's application for Malaysian citizenship pursuant to art 14(1)(b) of the Federal Constitution ('the FC') read together with s 1(e) of Part II of the Second Schedule of the FC was rejected. The appellant applied to quash by way of an order of certiorari and for an order of mandamus directing the first respondent to issue the MyKad or Certificate of Confirmation of Citizenship that recognised the appellant as a Malaysian citizen by operation of law under art 14(1)(b) of the FC in the judicial review application. The High Court made a finding that the appellant had failed to fulfil the requirements of s 1(e) of Part II, Second Schedule read with art 14(1)(b) of the FC to obtain citizenship by operation of law. The High Court found that both her parents were Cambodian nationals at the time of her birth and that she had failed to show that she was not a citizen of any other country at the time of her birth. The High Court dismissed the appellant's application for judicial review and hence, this appeal.

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Held, dismissing appeal with no order as to costs:

(1) The appellant was born on 3 June 1986 at the Cherating Refugee Camp, Kuantan, Pahang. Hence, the first requirement of being born in the Federation after Malaysia Day under art 14(1)(b) read with s 1(e) of Part II of the Second Schedule of the FC was met (see paras 13–14).

(2) As for the second requirement, the appellant's lineage and the citizenship laws governing her parents' nationality would be relevant to determine whether or not the appellant fulfilled the requirement that she 'was not born a citizen of any country'. The appellant though born on Malaysian soil, would be a person born a citizen of another country, ie, Cambodia, by virtue of the principle of *jus sanguinis*. Hence, she would not be stateless at the time of her birth. The appellant had to prove that she was stateless at the time of her birth to avail of her rights under s 1(e) of Part II of the Second Schedule of the FC. It was incumbent upon the appellant to demonstrate to the court why she was not entitled to Cambodian citizenship at birth. This the appellant had failed to do. As such, the appellant could not be said to be a stateless person for the purpose of citizenship by operation of law under s 1(e) of Part II of the Second Schedule of the FC. Article 14(1)(b) of the FC, read with s 1(e) of Part II of the Second Schedule, were not applicable to the appellant, and the appellant was not a citizen of the federation by operation of law (see paras 20–21 & 24–25).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan semakan kehakiman perayu. Perayu dilahirkan pada 3 Jun 1986 di Kem Pelarian Cherating, Kuantan, Pahang. Kedua-dua ibu bapanya adalah pelarian dari Kemboja, dan pada masa kelahiran perayu mereka bukan warganegara Malaysia. Mereka kemudian telah menjadi warganegara Malaysia. Sejak lahir, perayu telah menetap di Malaysia dan kini merupakan pemastautin tetap. Permohonan perayu untuk kewarganegaraan Malaysia menurut perkara 14(1)(b) Perlembagaan Persekutuan ('PP') yang dibaca bersama s 1(e) Bahagian II Jadual Kedua PP telah ditolak. Perayu memohon untuk membatalkan melalui perintah certiorari dan perintah mandamus mengarahkan responden pertama mengeluarkan MyKad atau Sijil Pengesahan Kewarganegaraan yang mengiktiraf perayu sebagai warganegara Malaysia mengikut kuatkuasa undang-undang di bawah perkara 14(1)(b) PP dalam permohonan semakan kehakiman. Mahkamah Tinggi membuat keputusan bahawa perayu telah gagal memenuhi keperluan s 1(e) Bahagian II, Jadual Kedua yang dibacakan bersama perkara 14(1)(b) PP untuk mendapatkan kewarganegaraan melalui kuatkuasa undang-undang. Mahkamah Tinggi mendapati bahawa kedua-dua ibu bapanya adalah warga Kemboja pada masa kelahirannya dan bahawa dia telah gagal untuk menunjukkan bahawa dia bukan warganegara mana-mana negara lain pada masa kelahirannya. Mahkamah Tinggi menolak permohonan perayu untuk semakan kehakiman dan oleh itu, rayuan ini.

Diputuskan, menolak rayuan tanpa perintah berkenaan kos:

(1) Perayu dilahirkan pada 3 Jun 1986 di Kem Pelarian Cherating, Kuantan,

Pahang. Oleh itu, keperluan pertama untuk dilahirkan di Persekutuan selepas Hari Malaysia di bawah perkara 14(1)(b) yang dibaca bersama s 1(e) Bahagian II Jadual Kedua PP telah dipenuhi (lihat perenggan 13–14).

(2) Bagi keperluan kedua, garis keturunan perayu dan undang-undang kewarganegaraan yang mengawal kewarganegaraan ibu bapanya adalah relevan untuk menentukan sama ada atau tidak perayu memenuhi syarat bahawa dia 'tidak dilahirkan sebagai warganegara mana-mana negara'. Perayu walaupun dilahirkan di bumi Malaysia, adalah seorang yang dilahirkan sebagai warganegara negara lain, iaitu, Kemboja, berdasarkan prinsip *jus sanguinis*. Oleh itu, dia tidak akan menjadi tidak bernegara pada masa kelahirannya. Perayu perlu membuktikan bahawa dia tidak bernegara pada masa kelahirannya untuk mendapatkan haknya di bawah s 1(e) Bahagian II Jadual Kedua PP. Adalah menjadi tanggungjawab perayu untuk menunjukkan kepada mahkamah mengapa dia tidak berhak mendapat kerakyatan Kemboja semasa lahir. Perkara ini telah gagal dilakukan oleh perayu. Oleh itu, perayu tidak boleh dikatakan sebagai orang tidak bernegara untuk tujuan kewarganegaraan melalui kuatkuasa undang-undang di bawah s 1(e) Bahagian II Jadual Kedua PP. Perkara 14(1)(b) PP, dibaca bersama s 1(e) Bahagian II Jadual Kedua, tidak terpakai kepada perayu, dan perayu bukan warganegara persekutuan melalui kuatkuasa undang-undang (lihat perenggan 20–21 & 24–25).]

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 9 MLJ 573; [2012] 4 CLJ 613, HC (refd)
Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong [2021] 2 MLJ 234; [2021] 5 CLJ 1, CA (refd)
Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2018] 6 MLJ 548, CA (refd)
Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 3 MLJ 625; [2008] 5 CLJ 42, CA (refd)
Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 5 MLJ 662, CA (refd)

Legislation referred to

Evidence Act 1950 s 103
Federal Constitution art 14(1)(b), Second Schedule, Part II, s 1(e)

Appeal from: Application for Judicial Review No WA-25–06 of 2019 (High Court, Kuala Lumpur)

N Surendran (with Shahid Adli bin Kamarudin) (Daim & Gamany) for the appellant.
Nik Mohd Noor bin Nik Kar (with Arina Azmin bt Ahmad Marzuki) (Federal Counsel, Attorney General's Chambers) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in Malaya dismissing the judicial review application of the appellant which, inter alia, sought the following reliefs:

(a) an order of certiorari to quash the respondents' decision dated 8 March 2019 rejecting the appellant's citizenship application under art 14(1)(b) of the Federal Constitution read with s 1(e), Part II, Second Schedule of the Federal Constitution;

(b) a declaration recognising the appellant as a citizen by operation of law under Second Schedule, Part II, s 1(e) art 14(1)(b) of the Federal Constitution;

(c) an order of mandamus directing the first respondent to issue a MyKad or Certificate of Confirmation of Citizenship that recognises the appellant as a Malaysian citizen by operation of law under art 14(1)(b) of the Federal Constitution; and

(d) a declaration that the respondents have breached the appellant's fundamental rights provided under the Federal Constitution and other provisions of the law.

[2] After careful consideration of oral and written submissions of parties, appeal records as well as relevant authorities, we found no merits in this appeal. We therefore dismissed the appeal and affirmed the decision of the learned High Court judge. The grounds of our decision are set out below.

FACTUAL BACKGROUND

[3] The appellant was born on 3 June 1986 at the Cherating Refugee Camp, Kuantan, Pahang. Both her parents were refugees from Cambodia, and at the time of the appellant's birth they were not Malaysian citizens. They have since been naturalised as citizens of Malaysia. Since birth, the appellant has lived in Malaysia and is now a permanent resident.

[4] The appellant applied for Malaysian citizenship pursuant to art 14(1)(b) of the Federal Constitution read together with s 1(e) of Part II of the Second

Schedule of the Federal Constitution, which was rejected on 8 March 2019. This is the decision that the appellant applied to quash by way of an order of certiorari and for an order of mandamus directing the first respondent to issue the MyKad or Certificate of Confirmation of Citizenship that recognises the appellant as a Malaysian citizen by operation of law under art 14(1)(b) of the Federal Constitution in this judicial review application.

ISSUES BEFORE THE HIGH COURT

[5] The appellant's contention is that once the requirements under art 14(1)(b) read together with s 1(e) of Part II of the Second Schedule of the Federal Constitution are met, she is automatically a citizen of Malaysia by operation of law. The appellant had referred to the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573; [2012] 4 CLJ 613 (HC) in support of that contention. Learned counsel for the appellant submits that all requirements under s 1(e) of Part II of the Second Schedule have been met and as such she is a citizen of Malaysia by operation of law under art 14(1)(b) of the Federal Constitution.

[6] There were two primary issues for determination by the High Court, namely:

(a) whether s 1(e) of Part II of the Second Schedule, and art 14(1)(b) of the Federal Constitution were applicable to the appellant; and

(b) whether the burden of proof lies on the appellant to establish on a balance of probabilities that the appellant was not born a citizen of any country for the purposes of s 1(e) of Part II of the Second Schedule.

FINDINGS AND DECISION OF THE HIGH COURT

[7] The High Court held that the appellant had the burden to prove that:

(a) she was born in Malaysia after Malaysia day; and

(b) that she was stateless at the time of birth.

[8] The learned High Court judge made a finding that the appellant had failed to fulfill the requirements of s 1(e) of Part II, Second Schedule read with art 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law.

[9] The High Court found that, contrary to the appellant's assertion of statelessness, the facts showed that both her parents were Cambodian nationals at the time of her birth and that she had failed to show that she was not a citizen

of any other country as the time of her birth. In the circumstance, the High Court dismissed the appellant's application for judicial review. A

GROUNDS OF APPEAL

[10] The memorandum of appeal contains several grounds of appeal. However, in the main, they may be summarised as follows: B

> (a) the learned High Court judge had erred in law and fact in her failure to appreciate that the appellant had satisfied the requirements of s 1(e) of Part II, Second Schedule of the Federal Constitution, C

[11] The learned High Court judge was quite right when she held that the appellant had the burden to prove the fact of having met the requirements of art 14(1)(b) read with s 1(e) of Part II of the Second Schedule of the Federal Constitution. D

[12] The relevant constitutional provisions abovementioned are reproduced below: E

Article 14(1)(b) of the Federal Constitution reads:

> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
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> ... F
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> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

And s 1(e) of Part II of the Second Schedule provides: G

> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
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> ...
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> (e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph. H

[13] In order to succeed in her application for citizenship by operation of law under art 14(1)(b) read with s 1(e) of Part II of the Second Schedule of the Federal Constitution, the appellant has to prove the dual requirements of: I

(a) being born in the Federation after Malaysia day; and

(b) that she is not born a citizen of any other country.

[14] There is uncontroverted evidence that the appellant was born on 3 June 1986 at the Cherating Refugee Camp, Kuantan, Pahang. The appellant's birth certificate is proof of that fact. Hence, the first requirement is met.

[15] As for the second requirement, the learned High Court judge referred to the decision of this court in *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662 and held that for the purposes of s 1(e) of Part II of the Second Schedule the burden of proof lies on the appellant to establish on a balance of probabilities that the appellant was not born a citizen of any country. See s 103 of the Evidence Act 1950 and also the cases of *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2018] 6 MLJ 548 and *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 3 MLJ 625; [2008] 5 CLJ 42.

[16] This legal principle is well established and we do not wish to elaborate any further. In order to ascertain whether the appellant had discharged the burden that she was 'not born a citizen of any country', the High Court would have to examine the facts and evidence of the case as disclosed in the affidavits filed. This, the learned High Court judge has done. We find that there is comprehensive appreciation of the evidence by the High Court and application of the applicable law.

[17] This court had in *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662 held that as a matter of law any person seeking to rely on art 14(1)(b) read with s 1(e) of Part II of the Second Schedule of the Federal Constitution to establish citizenship by operation of law would have to establish the requirements of both *jus soli* and *jus sanguinis*. In this regard, this court had explained that:

> [23] Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli* ie place of birth; while para 1(e) of Part II of the Second Schedule of the Federal Constitution ('not born a citizen of any country') encapsulates the requirement of citizenship by *jus sanguinis* ie by blood or lineage.
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> [24] Thus, it would appear that the second appellant would need to satisfy both the requirements of *jus soli* and *jus sanguinis* in order to fulfil the requirements of art 14(1)(b) and para 1(e) of Part II, Second Schedule of the Federal Constitution (refer to *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717).
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> [25] The doctrines of *jus soli* and *jus sanguinis* were explained in the case of *Singh v Commonwealth of Australia* [2004] HCA 43, which was referred to in the case of *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717 at p 747 as follows:

> By the late nineteenth century, international law recognised two well established rules for acquiring nationality by birth: *jus soli* and *jus sanguinis* (The Australian Legal Dictionary (1997)) defines *jus soli* to mean: a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place; and defines *jus sanguinis* to mean: a right of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth.

[18] Learned counsel for the appellant submits by reference to the legislative history of art 14(1)(b) and s 1(e) of Part II of the Second Schedule of the Federal Constitution that *jus sanguinis*, ie citizenship by blood lineage, is not a requirement or feature of s 1(e) of Part II of the Second Schedule of the Federal Constitution. With respect, we are unable to accept that contention. The pronouncement of this court in *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662 is very clear, in that *jus sanguinis* is one of the principles that the court looks at to determine whether the appellant through lineage was 'not born a citizen of any country'. We do not find any reason to depart from that decision, and in any event we are bound by the doctrine of stare decisis to follow that decision. See: *Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong* [2021] 2 MLJ 234; [2021] 5 CLJ 1 (CA); and *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 (FC).

[19] Further, as to whether *jus sanguinis* is a necessary feature in an application for citizenship under para 1(e) of Part II of the Second Schedule of the Federal Constitution, this court had in *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662 said:

> [27] The contentious issue is in respect of the requirement of *jus sanguinis* in para 1(e) of Part II of the Second Schedule of the Federal Constitution, as expressed by the phrase, 'who is not born a citizen of any country'. For the purposes of this requirement the material time to determine the status of the second appellant's lineage is at the time of his birth.
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> [35] A plain reading of para 1(e) 'was not born a citizen of any country' refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth ...

[20] Thus, if the blood line or parentage can be ascertained, as in this case, then the appellant's nationality at her time of birth can be determined by reference to the nationality of her parents. Her lineage and the citizenship laws governing her parents' nationality would be relevant to determine whether or not the appellant fulfils the requirement that she 'was not born a citizen of any country'. In that event, the appellant though born on Malaysian soil, would be a person born a citizen of another country, ie Cambodia, by virtue of the

principle of *jus sanguinis*. Hence, she would not be stateless at the time of her birth.

[21] In this regard, we concur with the High Court that the appellant has to prove that she was stateless at the time of her birth to avail of her rights under s 1(e) of Part II of the Second Schedule of the Federal Constitution. The facts show that her parents were refugees from Cambodia. Thus, there was evidence of the parents' country of origin. Though the appellant's birth certificate issued by the first respondent did not state the nationality of her parents, that does not mean that her parents were stateless. The burden to proof that fact rests upon the appellant.

[22] Here, the identity and status of the appellant's maternal and paternal connection have been established. There is documentary evidence establishing this. The Permit Masuk for the appellant's father's permanent residence in Malaysia issued by the Jabatan Imigresen Malaysia states the nationality of the appellant's father as 'Kampuchea', ie Cambodia. This information could only have been given by the appellant's father when applying for permanent residence, and the fact of her father's Cambodian nationality then is not refuted by the appellant.

[23] Now, if that were so, then the appellant has to show why she is not entitled to acquire the citizenship of Cambodia through her father or mother at the time of birth, ie through the principle of *jus sanguinis*. The learned High Court judge found that the appellant had failed to discharge that burden. This is very well stated by the learned High Court judge in paras 18–20 of the grounds of judgment:

> [18] The applicant still has to establish on balance of probabilities that she is a stateless person ... The country by which she has a relevant link must be viewed by her birth, descent, and marriage of her parents to determine whether she is truly a stateless person. The applicant had to proof (sic) that she is stateless as her parents were still Cambodian citizens when the applicant was born.
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> [19] This court agrees with the respondents' submission that to acquire citizenship under para (e) of s 1 of Part II, the applicant must not be born a citizen of any other country. Whether she acquires citizenship of Malaysia or otherwise in other countries by virtue of her parents' origin would depend on the law of citizenship of her parents. If the said country's law does not confer citizenship on her, only then would she be considered for citizenship under paragraph (e) of s 1 of Part II.
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> [20] The court cannot easily declare the applicant as a stateless child and grant citizenship under s 1(e) of Part II, Second Schedule of the Federal Constitution as the status of the paternal and maternal origin has been determined and is undisputed. It is the view of the court that at this juncture, the applicant had not discharged that burden. As such, the applicant could not be considered a stateless

person for the purpose of citizenship by operation of law under s 1(e) of Second Schedule.

[24] We do not find any fault in that reasoning, and we agree with the learned High Court judge that it is incumbent upon the appellant to demonstrate to the court why she is not entitled to Cambodian citizenship at birth. This the appellant had failed to do. As such, the appellant could not be said to be a stateless person for the purpose of citizenship by operation of law under s 1(e) of Part II of the Second Schedule of the Federal Constitution.

[25] Thus, we agree with the learned High Court judge that art 14(1)(b) of the Federal Constitution, read with s 1(e) of Part II of the Second Schedule, are not applicable to the appellant, and that on the available evidence the appellant is not a citizen of the federation by operation of law. To that extent we do not find any error on the part of the learned High Court judge that would warrant appellate intervention.

[26] We have taken note of the fact that the appellant's parents and siblings have all acquired Malaysian citizenship, and that the appellant is the sole exception. We empathise with her predicament. Nevertheless, it is still open to her to apply for citizenship by naturalisation, if the legal requirements are met to the satisfaction of the authorities.

[27] In the premise of the foregoing, we dismissed the appeal with no order as to costs.

Appeal dismissed with no order as to costs.

Reported by Nabilah Syahida Abdullah Salleh